

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SARRI ANNE SINGER,

Plaintiff,

v.

BANK OF PALESTINE,

Defendant.

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* Case No. 19-CV-00006 (ENV)

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TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE
BEFORE THE HONORABLE ROBERT M. LEVY
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Proceedings commenced)

2 THE COURT: Good morning. This is Judge Levy.
3 We're here on Docket No. 19-CV-0006, Singer v. Bank of
4 Palestine.

5 Would counsel please state their appearances for the
6 record, starting with plaintiff?

7 MR. RADINE: Good morning. This is Michael Radine,
8 from Osen LLC, on behalf of plaintiffs, and I'm joined today
9 by Gary Osen.

10 MR. BERGER: For Bank of Palestine, Your Honor, this
11 is Mitchell Berger and I'm joined by Joseph Alonzo.

12 THE COURT: Is anyone expecting anyone else at this
13 point?

14 MR. RADINE: Not from --

15 MR. BERGER: No, Your Honor.

16 THE COURT: All right. So we've had extensive
17 briefing on the motion to compel, motion for protective order.
18 So why don't we focus on -- why don't I stay with plaintiff's
19 counsel. If you were to list briefly what it is that you're
20 seeking today, or what it is you would be satisfied with at
21 this point, what would that be?

22 MR. RADINE: Sure. Thank you, Your Honor. This is
23 Michael Radine speaking. If my colleague, Gary Osen, jumps in
24 at any moment, he'll introduce himself as well so it's clear
25 for the reporter.

1 So very briefly, the relief we're seeking is as
2 follows.

3 First, based on what has occurred in discovery so
4 far, we believe the Court needs to appoint an independent and
5 qualified vendor to review the backup tapes and a copy of the
6 bank system for responsive records.

7 So that would be a vendor that the parties can
8 jointly and transparently communicate with so we're not left
9 out of the process.

10 In our view, anything short of that is going to just
11 bring us right back here with additional motion practice and
12 time and money wasted on expert opinions, all disputing
13 records that we can't see or representations we can't test.

14 Second, we want the Court to order BOP to produce
15 all the actual search terms and search queries it used in this
16 process and the systems those searches were performed on.
17 That's something we still don't have, which in our view is
18 inexplicable at this stage.

19 Third, we want the Court to order BOP to produce the
20 database schema and data dictionaries, which any independent
21 and qualified vendor will need anyway to properly perform a
22 meaningful search, in which we need to interpret the queries
23 we've gotten from BOP so far, as well as any future queries
24 the parties can agree upon.

25 Fourth, and this shouldn't have been something

1 necessary to ask the Court for assistance with, but we need
2 the Court to order BOP to provide the backup tape indexes from
3 Sullivan Strickler that they promised us in January, and that
4 they withheld, despite relying on them in their briefs.

5 Fifth, we want the Court to order BOP to fully,
6 completely, and honestly answer the interrogatories we've
7 identified in our briefs, including listing all the relevant
8 accounts they held for the Hamas entities we identified in the
9 complaint, as well as any accounts they've held during the
10 time period for Ahmed Alcurd (ph) the Hamas SDGT, that's a
11 specially designated global terrorist, who is also the person
12 in charge of Al Salah (ph), another customer of the bank, and
13 also a specially designated global terrorist.

14 Sixth, and then finally, Your Honor, we want the
15 Court to order BOP to produce responsive records for all the
16 subject entities who held accounts at the bank, including the
17 Al Salah account which they have only now acknowledged in
18 surreply that they have withheld.

19 So I'll stop there in our list of demands for any
20 questions from the Court.

21 THE COURT: Could you repeat the last demand? I'm
22 not sure I fully understood it.

23 MR. RADINE: Yes. We want the Court to order BOP to
24 produce responsive records for all of the subject entities who
25 held accounts at the bank or who processed transactions

1 through the bank. So that would include the Al Salah account
2 raised in our last brief, but it would also include non-
3 account holders who processed transactions through the bank,
4 say, to an account holder for instance.

5 THE COURT: Okay. And when you say all subject
6 entities, is there any limitation on that?

7 MR. RADINE: I mean, just the ones that are raised
8 in our request for production, which is, you know, a short
9 list. I think that -- you know, as we've raised with
10 defendants and in our briefing, there is different ways that
11 may be identified.

12 Accounts may be held by the leadership of those
13 groups who are largely themselves designated SDGTs. They may
14 be joint accounts, beneficial accounts. We haven't, you know,
15 had a limitation there because we haven't had an opportunity
16 to have that conversation.

17 In fact, they have so far refused to even tell us
18 what accounts they think they have, much less whether we need
19 to dig further or push back on their definitions.

20 THE COURT: All right. Thank you. So for BOP,
21 which, if any of these six demands, are you prepared to
22 consent to?

23 MR. BERGER: So, Your Honor, Mitchell Berger for
24 BOP, and I know you've read the papers and have heard this ad
25 infinitum from both sides, but honestly, Items 2 and 3, we've

1 already provided.

2 I hear Mr. Radine saying they're not satisfied, but
3 there is no doubt that we have provided search queries and
4 search terms, which is Item 2. There is no doubt we have
5 provided the database schema, which is Item 3.

6 We object to No. 1, because they're basically saying
7 that they have the right jointly with the bank, to root
8 through the bank's undifferentiated records so that they can
9 search for what they want, and that is not only far outside of
10 jurisdictional discovery, but no organization would let the
11 plaintiffs come in and just sort of root through their records
12 so that they were satisfied.

13 And when they say an independent and qualified
14 vendor would do this, they also said -- Mr. Radine said they
15 want equal access to them. In other words, they get to look
16 at all our data.

17 So one, is completely unacceptable. Four, even
18 though it will simply reopen the endless debate over discover
19 and discovery, we will produce the indexes done by Sullivan
20 and Strickler of the backup tapes, as I understand it, 196,000
21 lines of text. Your Honor, frankly, you can imagine we will
22 be back here a year from now arguing over what is in those.

23 Numbers 5 and 6, we have -- object to, because let
24 me explain in plain English what I heard Mr. Radine say. They
25 want to count records. I have no doubt not only in my mind,

1 that what Judge Vitaliano ordered was a transactional
2 discovery, not account discovery.

3 But I have to say, if you would look at Mr. Radine's
4 declaration, Exhibit 1, their first request for production of
5 documents, it included what they called a jurisdictional
6 limitation. It said, and I'm quoting, "For purposes of the
7 documents requested below, Bank of Palestine needs only
8 produce responsive records that reflect funds, transfers that
9 cleared and/or settled in or through the United States," close
10 quote.

11 That is at Page 4 of Radine Declaration, Exhibit 1.
12 We have moved well beyond what even they conceded at the
13 outset is appropriate when they asked for all account
14 documents for all of the subject entities. The account
15 records have nothing to do with what Judge Vitaliano ordered,
16 and they have nothing to do with what the plaintiffs
17 themselves requested.

18 So to recap, we have provided 2 and 3, we will
19 provide 4, we object to 1, 5, and 6.

20 THE COURT: All right. Would plaintiff like to
21 respond?

22 MR. RADINE: Sure. I'll just go through the request
23 and order in terms of responding to that.

24 So for the independent vendor, we want equal access
25 to the vendor. We don't need equal access to the data. We

1 don't need to root around in BOP's data necessarily. What we
2 need to make sure is that BOP no longer has the ability to sub
3 silentio define for themselves what they'll search, what's
4 relevant, what kind of transaction is relevant, how queries
5 are designed, how search terms are designed, and so on.

6 And then when they get results from the vendors that
7 they've hired, withhold them from us so we have no idea. I
8 just mean, for instance, the file indexes. I don't mean all
9 the raw data that's necessarily developed.

10 An appropriate protective order can be put in place
11 to make sure that the raw data is handled appropriately, but
12 what's happened so far is that they've spent, I think vastly
13 more money on the vendors they had retained to produce
14 misleading results that we have no daylight on than would have
15 been spent just doing this in a forthright -- in a forthright
16 manner, that we need an independent vendor to do. And
17 (indiscernible) --

18 THE COURT: So let me stop you for one second on
19 this. So if you were to define the parameters of what you're
20 requesting, what would be the scope of the raw data that you'd
21 be looking for, and to what extent do you have a sense of the
22 cost?

23 MR. RADINE: So the scope of the raw data we've been
24 looking for would be transactions relating to these subject
25 entities that may have passed through or processed in New

1 York. That's not -- there's different kinds of evidence that
2 can show that, which is why there may be a broad definition.
3 U.S. dollar transactions that are passed -- it's certainly our
4 position that U.S. dollar transactions that are passed from
5 one foreign bank to another are cleared and/or settled in New
6 York. So just to -- Mr. Berger just read from our first
7 request for production. This is a great example. And as he
8 read, our request is limited to funds transfers that quote,
9 "Cleared *and/or* settled in or through the United States."

10 So in their surreply, they argue that they were
11 entitled to remove U.S. dollar check transactions from the
12 production because those are cleared in the Palestinian
13 territories. That may be the case, but they are certainly
14 settled in New York, hence the phrase, cleared and/or settled.
15 And as Mr. Berger knows from *Spetner* (ph), another case we
16 have together, it is our position that that qualifies as
17 purposeful availment, and certainly that will be a decision
18 the circuit will make at some point.

19 So all manner of other kinds of transactions may
20 qualify, and while we are happy to have that discussion with
21 defendant to define that universe, what we can't have so far
22 -- as we've had so far, is to have them define that for
23 themselves but then not tell us what that is and just to have
24 us learn later that they've been removing those transactions.

25 MR. BERGER: Your Honor, may I respond? This is

1 Mitchell Berger.

2 THE COURT: Yes.

3 MR. BERGER: I'm going to have to say that what Mr.
4 Radine is asking for is truly extraordinary, and I mean, I
5 know plaintiffs are never settled in any -- satisfied in any
6 case with what they get and always want more, but the reality
7 is the bank searched for precisely what Mr. Radine is asking
8 for, and the bank found precisely what Mr. Radine is asking
9 for, and the bank produced, almost a year ago, precisely what
10 he's asking for.

11 They're not complaining, when you strip it down to
12 the bare essence, about our search terms or our search
13 process. They are complaining about the search results. They
14 are saying, there must be more, and therefore, somebody else
15 needs to have a go at this.

16 What he said about our removing checks is simply
17 incorrect. You can look at Singer 1 through 13, which is the
18 spreadsheets we produced, and they include checks. We over
19 included information in Singer 1 through 13, even though we're
20 prepared to prove on the merits when we get to the
21 jurisdiction argument, that those checks did not pass through
22 the United States.

23 So that's simply a factually incorrect statement to
24 say that we've carved this stuff out, when what we carved out,
25 and what clearly falls within both their jurisdictional

1 limitation and with what Judge Vitaliano ordered, are things
2 like a credit for interest. There is no way that a credit for
3 interest, which is a book-to-book entry, could possibly have
4 passed through the United States.

5 And so I understand they have a view of what the law
6 is or what the law should be, but if a check is cleared on a
7 book-to-book basis within Palestine, it simply is not
8 something that passed through the correspondent account in the
9 United States, which is the focus of jurisdiction.

10 So I hear what he's saying, but the bank did this
11 job, and absent their proving some material defect in what we
12 did as opposed to their saying, well, there must be more,
13 there's no reason for that.

14 Let me just give two points about historical context
15 here, which is, they can complain that they haven't gotten
16 what they think is enough, but the very correspondent banks
17 that were on the other side of these transactions in the
18 United States, JP Morgan Chase, Citibank, they have nothing
19 because we're talking about ancient history.

20 SWIFT itself, the platform that was used for
21 transferring -- making transfers, they have nothing. Bank of
22 Palestine, because it did a good job here, despite all the
23 rhetoric Mr. Radine wants to use, did a good job. We found
24 what JP Morgan Chase and what Citibank and what SWIFT couldn't
25 find, and that's just the truth.

1 THE COURT: Mr. Radine.

2 MR. RADINE: Sure. The statement that they removed
3 transactions from their production is from the El Reyes (ph)
4 declaration at Paragraph 14, the statement that they removed
5 checks is from Mr. Berger's brief. Page -- what am I on here?
6 18.

7 Plaintiff should not be permitted belatedly to seek
8 jurisdictional discovery here of checks cleared locally in
9 Palestine based on a jurisdictional theory that they have not
10 asserted in this action and was rejected by the District Court
11 in *Spetner* (ph).

12 Of course, the district court in *Spetner* was
13 rejecting an argument based on the fact that that bank and
14 another interposed correspondent bank, but the statement here
15 is that we should not get jurisdiction discovery of checks
16 cleared locally in Palestine, as in, they have omitted checks
17 that in their view were cleared locally in Palestine, even
18 though they know it's our position that those checks were
19 settled in New York. It's the second step of that process.

20 The Al Salah account that they withheld, the
21 transactions, incoming transactions they are U.S. dollar
22 denominated checks, and yet we didn't get the entire account
23 because they choose to interpret those dollar checks as book-
24 to-book transactions, and again, to be clear, did not tell us
25 about this.

1 It is a grievous abuse of the discovery process to
2 withhold information like this without discussing it with us
3 or the Court, and then to give this misrepresentation
4 description to the Court now.

5 MR. BERGER: Your Honor, if -- and I --

6 THE COURT: Well, hold on one second.

7 MR. BERGER: -- maybe some facts would help you.

8 THE COURT: Yes. Mr. Berger, just a question. So
9 there is some discussion of a distinction between clearing
10 checks in the Palestinian territory and settling them in the
11 U.S. What is the distinction for someone who is not a banking
12 expert?

13 MR. BERGER: Your Honor, is that question directed
14 to me or Mr. Radine?

15 THE COURT: I think to Mr. Radine first, and then to
16 you, Mr. Berger.

17 MR. RADINE: Sure. Sure. So the processing process
18 -- in *Lashay* (ph), the Court talks about processing
19 transactions through New York correspondent banks, and for --
20 just to sort of boil down a complicated universe here, when
21 banks, foreign banks move U.S. dollar denominated assets from
22 one bank to another, they do it virtually in a sense, and the
23 actual passage of money, of like a real value money, what's
24 called settlement finality, happens across the books of the
25 Federal Reserve Bank in New York.

1 Now that requires that each transaction that passes
2 from one foreign bank to another, be in a sense, sent to New
3 York, and the SWIFT messaging system is the system generally
4 used to execute those transfers.

5 Now one way to cut down on transaction costs is to
6 net out some of the countervailing transactions between banks
7 first, and then take the remaining credit position that the
8 banks are into each other, and settle that in New York.

9 So what you tend to get -- and we have the same
10 thing in the United States with checks by the way. What you
11 tend to get is a clearinghouse structure, where checks passed
12 among banks in a given day are canceled against each other,
13 set off against each other among the banks in the
14 clearinghouse.

15 And that is a function that the Palestine monetary
16 authority provides in the Palestinian territories. The
17 resulting credits and debits are then settled by the banks
18 through SWIFT message wire transfers between themselves and
19 the PMA, which again then distributes the money.

20 So the actual value of the check is settled in New
21 York. If a check is not settled through that New York
22 process, the check can be unwound, as in as if it never
23 happened. So it's not an ancillary step in the process.

24 This was briefed at length, and I won't bore the
25 Court with this, but this was briefed in length in *Spetner*,

1 where it's a key allegation and the first issue presented by
2 the plaintiffs, and was argued ostensibly by the two parties
3 before the panel there. So I'll pause there. But also, I
4 have one more note. Sorry.

5 So other asset transfers work this way. All U.S.
6 dollar credit cards that are cross-border or cross-bank tend
7 to be settled in the United States. MoneyGram transfers work
8 this way as well.

9 So all those SWIFT messages are usually used to
10 execute one part of that transaction. The point is, is that
11 all of them are settled in New York and it's our position that
12 that qualifies as a purposeful availment raised in *Leshay*.
13 And I'll stop there.

14 MR. BERGER: So, Your Honor, three points. First of
15 all, what Mr. Radine said is an overstatement, and don't take
16 my word for it.

17 If you look at Paragraphs 8, 9, and 10 of the El
18 Reyes declaration that we filed, you will see that there are
19 three flavors here, vanilla, chocolate, and strawberry for
20 lack of a more imaginative description. Not all checks clear
21 through the United States.

22 If Depositor A at Bank of Palestine writes a check
23 to Depositor B at Bank of Palestine, that check doesn't go
24 anywhere near the central bank's clearing process, doesn't go
25 anywhere near the United States.

1 What happens is, Bank of Palestine makes a book
2 entry that says Depositor A wrote a check to Depositor B,
3 therefore one's account goes down, the other one goes up.
4 That type of check is a check we would have removed because it
5 is a book entry.

6 Number two, sometimes there's a check written
7 between a customer at Bank of Palestine and another bank, say
8 Palestine Investment Bank, the bank that is involved in the
9 *Spetner* case that Mr. Radine likes to talk about. That type
10 of check does not go through the United States. It is not a
11 clearinghouse check.

12 What happens is literally every Palestinian bank
13 once a day meets at the central bank, and they exchange
14 checks, and they see whether or not they have a net credit
15 owed to them or a net debit that they have to pay off.

16 If there is one net debit that they have to pay off,
17 then that check that was exchanged, those checks that were
18 exchanged do not go through the United States. What happens
19 is, bank -- the central bank in Palestine says, okay, make a
20 bulk transfer of money for whatever it is you owe the other
21 bank and send it to our correspondent account in the United
22 States.

23 What's important here is none of this was ever
24 mentioned to Judge Vitaliano. None of this is mentioned in
25 their amended complaint. They like this theory, they used it

1 in the *Spetner* case, they've never used it here, has nothing
2 to do with here, but it doesn't matter because we have
3 produced that information.

4 Only if there is a check that went through, and this
5 is Paragraph 10 of Mr. El Reyes's declaration, there's a check
6 that has to go to the United States, so there's a transfer
7 that goes to the United States. That's what Judge Vitaliano
8 was focusing on. That they've -- this new theory which they
9 seem to like has nothing to do with the theory that brought us
10 to jurisdiction discovery.

11 But as I was saying earlier, some facts will help.
12 From our standpoint, the proof of the pudding that we have
13 done what we said we were going to do is in the actual
14 spreadsheets. Singer 1 through 13, you can find these
15 attached to Mr. Radine's declaration at Exhibit 2. If you
16 look on the various entries, and there are 250 entries on
17 these spreadsheets, you will see -- I'm looking at the first
18 entry on Page 1, clearing funds withdrawal. The next one,
19 clearing checks deposit. It has clearing funds withdrawal
20 throughout. You will see that in fact, contrary to
21 what Mr. Radine is telling you, the last entry on Singer 2,
22 clearing checks deposit, that this notion that we somehow sub
23 silentio removed things -- he wants to point to this new
24 account record they came up with in their surreply.

25 There were two -- there are two credits, if you

1 will, to the account in that one. And, Your Honor, I
2 recognize, we're on the public record here and this has all
3 been filed under seal and we seem to have other participants
4 in this hearing, so I want to be careful.

5 But those were confirmed by the bank to be of the
6 first type that I mentioned, entirely local transactions. The
7 bank is entitled in winnowing non-responsive information out
8 of otherwise responsive information to do that.

9 And this notion that effectively some special master
10 has to be appointed because they don't like the fact that the
11 bank did what every other responding party does, which is to
12 apply a responsiveness screen to undifferentiated data, this
13 is -- it is overkill and it is inappropriate. They have not
14 demonstrated anything that would warrant taking, as is
15 appropriate, the document production process out of the hands
16 of Bank of Palestine.

17 And I have just given you chapter and verse in
18 Singer 1 through 13, which contradicts everything Mr. Radine
19 told you about our supposed pruning and editing.

20 THE COURT: Mr. Radine, is that correct?

21 MR. RADINE: No, Your Honor. So the only part of
22 that that was correct is that checks passed from one account
23 to another at the same bank won't necessarily be settled in
24 the United States because they can be credited/debited via a
25 book-to-book entry.

1 Well, the other part that was sort of partially
2 correct was Mr. Berger's sort of dismissive attempt to kind of
3 put the bulk payment through New York at the end of the check
4 clearing process. That is the settlement of the checks.
5 Without that step, those checks are unwound.

6 He is attempting to then draw focus to a different
7 process where if you get a check from like a U.S. bank, then
8 you really do physically mail that check back to New York, but
9 that's not what we're talking about.

10 We're talking about checks passed from one
11 Palestinian bank to another are all settled in New York. I
12 know that Mr. Berger doesn't agree with whether that qualifies
13 as purposeful availment because it happens a step later in the
14 process. That's neither here nor there.

15 The fact, of course, that our complaint does not
16 spell out this entire process is because our complaint is
17 establishing BOP's liability for terror financing. It is not
18 attempting to exploitate the entire check clearing process.
19 That is a step for discovery, where we're in now. And
20 certainly, Mr. Berger has known from his days with us in
21 *Spetner*, that we consider that a process that qualifies as
22 purposeful availment.

23 As for the terms used in the Singer 1 through 13,
24 the word check does show up in some confusing ways. We asked
25 them in one of our letters, many, many, many months ago, for

1 definitions of the transaction types that he is describing.
2 So for instance, like he just mentioned, clearing checks
3 deposit. They refused to provide those. In fact, they just
4 provided the list again in Arabic, which was simply the same
5 words we have here in English, but with no definitions. I
6 don't know what a clearing check deposit is.

7 I do know that in their opposition brief, BOP called
8 all manner of these transaction types, quote, clearly local,
9 which now I guess he's taking back as to these checks. And
10 while I appreciate that, it doesn't change the fact that we
11 don't have definitions of these terms.

12 But from at least the Al Salah account and from the
13 description that he just gave you, they call the checks of the
14 same species that are at issue in *Spetner* -- *Spetner* is not
15 about checks that were mailed to the United States. *Spetner*
16 is about checks being passed from one Palestinian bank to
17 another. They say those are checks they have the entitlement
18 to withhold from us, and they know that is wrong.

19 MR. BERGER: So, Your Honor, I have one point and
20 two suggestions if I may, that maybe will simplify things and
21 make everybody's life easier and avoid this sort of complete
22 overkill notion that some special master needs to redo work
23 that we believe the bank has done appropriately.

24 The one point I want to make is, I understand Mr.
25 Radine likes this theory that bulk transfers create

1 jurisdiction, even though it's not pled in the complaint.

2 They made that argument, Mr. Radine and his colleagues, in the
3 *Spetner* case, and Judge Komitee rejected it as a matter of
4 law.

5 Yes, they've appealed to the Second Circuit, but so
6 far the law in the Eastern District is what Judge Komitee held
7 in the *Spetner* case, which is transfers, bulk transfers
8 involved that are directed by the Palestinian Monetary
9 Authority, the central bank, do not create jurisdiction, full
10 stop.

11 And don't take my word for it, Your Honor, you can
12 read the opinion. But these are really jurisdictional merits
13 issues and not jurisdictional discovery issues which leads to
14 my two suggestions if I may?

15 Number one, to eliminate any doubt about the fact
16 that we believe we've already been over-inclusive, we're happy
17 to reproduce the spreadsheets, Singer 1 through 13, and
18 include in them all manner of checks, even manners of checks
19 that we believe demonstrably, according to the bank's due
20 diligence, were only cleared locally, never got anywhere near
21 this jurisdictionally irrelevant PMA process. So it will be
22 done. We will reproduce the sheets. They will then have it.

23 So now where are we? Now we, I would suggest, and
24 this leads to my second suggestion is, we ought to be able
25 when we're done with the rest of Mr. Radine's wish list today,

1 to move -- renew our motion to dismiss for lack of
2 jurisdiction, and we will put in affidavits that explain all
3 of these points that I am explaining to you.

4 If, in response to that renewed motion, where we
5 have a framework and we have evidence on this issue, they feel
6 they need further jurisdictional discovery to respond, then
7 they can make that application to Your Honor, because Your
8 Honor has been, of course, authorized by Judge Vitaliano to do
9 it. But we have now -- Judge Vitaliano's order came out April
10 30th of 2021.

11 We've been at jurisdictional discovery for nearly 13
12 months. We need to get back to the business of demonstrating
13 why the evidence we've produced is jurisdictionally
14 irrelevant, rather than Mr. Radine trying to convince you he's
15 right, and my trying to convince you we're right about the
16 significance of this information.

17 We'll reproduce the additional detail he wants and
18 we can hash it out in the context of the motion, and if he
19 says, you know what, I still don't think I need any, but
20 here's my more targeted jurisdictional discovery request, I've
21 seen their motion, fine. Your Honor, we'll deal with it in
22 that context.

23 THE COURT: Mr. Radine.

24 MR. RADINE: No, that doesn't work for us. First of
25 all, I'm sorry, we'll -- I know you're probably tired of

1 hearing about *Spenter*, but just to be clear, I just want to
2 clarify for the record, that's not an accurate -- Mr. Berger
3 knows that's not an accurate description of what happened in
4 that case. In that case, and I'll keep this very brief,
5 Palestine Investment Bank, unlike BOP, did not have a
6 correspondent bank account in New York. It had a
7 correspondent -- it was called a nested account in Jordan, and
8 that bank had a correspondent account in New York.

9 As the Court can see from reading the *Spetner*
10 decision, that decision came down entirely to whether using a
11 nested account in Jordan still meant that the bank was
12 purposefully availing itself of the New York system. It does
13 not have representation that the Court -- that -- sorry.

14 It was not Judge Komitee's position that check
15 clearing and settlement through a bank's own correspondent
16 account in New York did not qualify as purposeful availment.
17 Mr. Berger knows that. It's clear from the decision, and also
18 I assume Mr. Berger knows that in the Eastern District,
19 district courts cannot bind each other.

20 But anyway --

21 MR. BERGER: Well, I want to just respond to that.

22 MR. RADINE: -- that's (indiscernible).

23 MR. BERGER: I have to respond to that.

24 MR. RADINE: Yeah, so, Mr. Berger, I --

25 MR. BERGER: There are two -- there are two theories

1 --

2 MR. RADINE: Mr. Berger.

3 MR. BERGER: There are two theories --

4 MR. RADINE: Mr. Berger.

5 MR. BERGER: -- Your Honor.

6 MR. RADINE: I'll finish my bit first and you can
7 talk when it's your turn.

8 MR. BERGER: It's really not for you to say. Your
9 Honor --

10 MR. RADINE: As for the proposal --

11 MR. BERGER: -- I'd like to be heard on that.

12 THE COURT: Just a minute, Mr. Berger. Let Mr.
13 Radine finish.

14 MR. RADINE: As for the proposal where they will now
15 produce checks that they withheld transactions, it's still --
16 and then we briefed the whole thing over again. It seems like
17 a poor use of time given that, A, we don't know what the terms
18 mean.

19 We obviously still disagree as to fundamental
20 issues. B, the entire process thus far has shown that BOP has
21 either through mendacity or incompetence, been unable to
22 manage their own systems, search them properly, or even
23 provide a query that they actually used in this case to
24 understand what dates mean and so on, to understand what
25 things like SWIFTNet Link files mean.

1 At this point, the far more efficient process is to
2 take this out of their hands and put it in the hands of an
3 independent and qualified vendor that can do a proper job of
4 these searches on agreed upon terms with whatever protections
5 are necessary for Bank of Palestine.

6 THE COURT: All right. Mr. Berger, you wanted to be
7 heard?

8 MR. BERGER: If I may be heard, Your Honor?

9 THE COURT: Yes.

10 MR. BERGER: Yeah, although I (indiscernible) to Mr.
11 Radine's last comment, I do have an additional point which is,
12 you know, I'm not going to respond in kind to this overheated
13 rhetoric like -- and I wrote it down -- mendacity or
14 incompetence, Mr. Radine says. That is not a productive way
15 to get to the bottom of solving a discovery problem if I may
16 so respectfully suggest.

17 We have worked very hard here. We have been
18 incredibly transparent, and just because they don't like the
19 fact of what we've produced, I'm trying to be positive and
20 productive in giving the Court some suggestions.

21 So let me suggest yet another thing that might move
22 the ball forward. But first, let me explain about *Spetner*,
23 and Your Honor, you don't need me to read the case for you.
24 We don't need Mr. Radine to tell you. They have two theories
25 in *Spetner*, both were theories that are not in this case.

1 One theory was the nested account theory that Mr.
2 Radine mentions. In other words, that bank didn't have a
3 correspondent account in the U.S., unlike BOP. Plaintiffs in
4 that case argue that the bank in Jordan they used was their
5 agent. Put that aside. That has nothing to do with this
6 case.

7 They also argued that the central bank, the PMA, was
8 the agent of PIB because that -- because the PMA had this
9 check clearing process.

10 Again, don't take my word for it, don't take Mr.
11 Radine's word for it. Judge Komitee wrote a published
12 decision on this and he rejected both theories, including the
13 PMA theory. That is a merits issue we will get to.

14 However, let's do this. I am now going to suggest
15 that not only will we reproduce the spreadsheets and include
16 the additional detail so they can see it, but we will have our
17 client produce an affidavit of the type we would produce in
18 support of our motion to dismiss, but we'll do it in advance.

19 That explains what these categories are and why
20 these categories would not have gone through the United
21 States. Or if there's some possibility that it could have
22 gone through the United States, why that possibility cannot be
23 resolved on the basis of the existing information.

24 Then Mr. Radine and his colleagues will have that
25 information before we renew our motion to dismiss. But to go

1 from saying, they don't understand document -- information we
2 produced that was responsive to their requests, to saying
3 forget it, even though we never asked to confer about search
4 terms and the like, take it out of the bank's hands contrary
5 to the rules of discovery, give it effectively to a special
6 master.

7 That's -- I think the word for Rule 26 that I can
8 use politely here is, not proportional to what we're supposed
9 to be dealing with here in limited jurisdictional discovery.
10 We want to get to the end game of renewing our motion to
11 dismiss for lack of jurisdiction. If that requires going
12 above and beyond what we've already done, then those are the
13 suggestions I've got.

14 THE COURT: All right. Well, I don't think
15 plaintiff is asking for a special master. Plaintiff is asking
16 for a paid vendor that can cut through some of these issues on
17 the grounds that it believes that the parties acting
18 independently, are able to cut through them.

19 MR. RADINE: That is correct, Your Honor.

20 THE COURT: So, Mr. Radine, what about reproducing
21 the spreadsheets with more explanations, et cetera, why
22 certain items are discounted or considered not relevant?

23 MR. RADINE: Of course they should reproduce records
24 with things they withheld inappropriately. They should have
25 done that in July, but that doesn't -- I think the -- if that

1 were the sole problem, if we were arguing about whether checks
2 were produced on that spreadsheet -- Mr. Berger kept saying
3 details. I hope he means transactions, but -- and in
4 additional accounts that we would consider qualified, such as
5 the Al Salah account.

6 But even to do that now, the history of this case I
7 think makes clear that that's not going to be sufficient, and
8 what will happen is we will indeed be back before Your Honor,
9 having moved the ball very little forward as we have
10 additional questions.

11 I know the affidavit they're proposing to put
12 forward was -- we've seen that in *Spetner*. Palestine
13 Investment Bank and BOP had the same operations. We don't
14 need to see that again. Nor with that address any other
15 problems. For instance, the SQL procedures don't search the
16 SWIFT fields of banks.

17 The various and numerable problems that we laid out
18 in our briefing, and I understand BOP's desire to avoid having
19 an independent and qualified vendor go through their records
20 and produce the ones that are actually responsive, but we
21 can't accept half measures at this point, especially when we
22 have no visibility on it.

23 MR. BERGER: How is that -- may I ask a question,
24 Your Honor, which is, this independent vendor, and I take Your
25 Honor's correction, I shouldn't use the words special master.

1 But the reason why it seems like one to me is the bit Mr.
2 Radine added at the end, which is, and to produce responsive
3 records.

4 In other words, this independent and qualified
5 vendor -- not just a technology expert -- apparently this
6 independent and qualified vendor is going to make legal
7 responsiveness determinations about what fits within the
8 categories of their document requests. That is an
9 inappropriate job where a technology advisor.

10 You know, if they now want to redo everything the
11 bank did by having agreed search terms, even though they
12 haven't explained anything wrong with our search terms,
13 although we have produced them, we have produced the SQL
14 queries, we produced the software code behind the SQL queries.

15 I really don't know what more we can produce,
16 because if they want to redo everything, no independent and
17 qualified vendor can take the bank's raw information and say,
18 you know, I have to -- I'm going to decide what's responsive
19 or not.

20 That is Bank of Palestine's job and solely Bank of
21 Palestine's job. And that is not a job for a technology
22 advisor or vendor because for example, what Mr. Radine keeps
23 saying, and these are his Items 5 and 6, they want all the
24 account information.

25 Well, they're not entitled to account information.

1 That's not a vendor issue. That is a Judge Vitaliano issue.
2 He didn't say account discovery. He said transactions
3 discovery. We've agreed to fill in what they think are the
4 gaps in missing transactions, and we have agreed to explain
5 what those transactions are.

6 And I understand, they want the moon and the stars,
7 but that's inappropriate here, completely out of line with the
8 law, and completely out of line with the facts here. We are
9 the ones who produced the spreadsheet. The spreadsheet gave
10 them what they asked for. They don't like it, that is not a
11 reason to have an independent vendor redo the process.

12 MR. RADINE: But, if I could respond to that, Your
13 Honor?

14 THE COURT: Yes. What's missing from what Mr.
15 Berger is offering you?

16 MR. RADINE: So the offer was just to produce
17 checks, or check-based transactional information that we don't
18 -- that they withheld so far.

19 I'll assume for a moment that that would include
20 like, counter-party information we've not been given.
21 Largely, you can see the counter-party column is largely blank
22 on the 13 pages.

23 And no, we don't trust the process as it works so
24 far. We don't even have a complete list of search terms, for
25 instance. There's no account numbers for example. We have no

1 idea if they searched for the accounts that we listed in our
2 complaint. There's no beneficial owners or joint owners or
3 anything like that in the search terms.

4 The query. The query they produced that took them
5 an entire year or replacing prior queries that they produced
6 after we filed the motion to compel, is not the query that
7 used those search terms, which alone is extraordinary. That
8 is a query that, as near as we can tell, they used by plugging
9 the account numbers that they've found and will not tell us
10 about, and then searched in some manner with banks. That's
11 what that is.

12 And by the way, as I mentioned earlier, of the field
13 it selects to search, it doesn't search the SWIFT fields.
14 Instead, Mr. Regard (ph) said in his declaration that he
15 separately asked the bank to go back and search those SWIFT
16 fields, and they found nothing, but we don't have that query
17 for instance.

18 The amount of gamesmanship here is breathtaking, but
19 no, it can't be kept any longer in their hands, even if
20 they're willing to produce one of the many categories of
21 information we have asked for, that being the checks.

22 MR. BERGER: So may I again respond with what I hope
23 are facts here? Let's deal with my suggestions first. I'm
24 not saying, oh, you know, let's -- I'll give you a little peek
25 here, I'll put in checks.

1 I am saying if what they want is all dollar
2 denominated transactions, even though we believe they are
3 exclusively local, during the relevant period that are
4 retrieved for the subject entities, then we will reproduce the
5 spreadsheets that have all dollar denominated transactions.

6 We will, number two, produce an affidavit explaining
7 why we believe that -- let's say it's 300 entries, that if
8 entries 1 and -- you know, we believe the -- these are all
9 local for the following reasons.

10 We believe we cannot tell whether the other ones are
11 local for the following reasons, even though we think they
12 didn't, because they're not SWIFT transfers. They will have
13 that.

14 It is simply incorrect to say we're withholding
15 counter-party information. That's a little bit like saying JP
16 Morgan Chase and Citibank are withholding SWIFT information.
17 We can't give them what we don't have. The bank did not
18 retain, for this ancient history period, counter-party
19 information. He can say gamesmanship, but I'm just telling
20 you facts trump speculation. There is no counter-party
21 information for this period of time because it was not
22 retained when the bank transferred from it's old IT system to
23 the new IT system.

24 If they -- next, the SWIFT system has been queried.
25 How do we know that? Singer 13, the last page of the

1 spreadsheet, has things that are denominated as SWIFT
2 transfers. I don't know where Mr. Radine thinks we got that
3 from if we didn't get it from the SWIFT system.

4 The proof of the pudding, the eyes on the prize here
5 is the spreadsheets. He doesn't want to focus the Court's
6 attention on the spreadsheets. The spreadsheets prove that we
7 looked for the right things, we found the right things, we
8 produced the right things.

9 I am now saying even though we think more
10 information is not responsive, because the end game here is to
11 get to a motion, we will give them that additional
12 information, we will give them that explanation by way of an
13 affidavit that they wouldn't otherwise see, into a renewed
14 motion.

15 And I just -- I think they have come up with nothing
16 other than saying, there must be more there that would justify
17 the expense time and burden of bringing in an independent
18 vendor and then arguing over the scope of the independent
19 vendor's authority, not just to run search, but to determine
20 what's responsive.

21 MR. RADINE: Your Honor, if I could respond to that
22 briefly?

23 First of all, we are -- as I have said throughout
24 this, we're happy with an order that protects BOP. They can
25 see the records first. We're not -- this is a red herring Mr.

1 Berger is trying to make (indiscernible) produce. But just to
2 be clear, of all the statements that you just received that
3 were untrue, and why that means we'd need an independent
4 vendor.

5 Number one, even if it were true that the counter-
6 party information is missing off the ancillary table, the
7 legacy system, there is nine months of responsive transactions
8 from banks that should have the counter-party information of
9 they're active banking system. They said it was one month
10 initially. We showed it was nine. They backed off of that.
11 One more reason they can't be sort of left alone with these
12 materials.

13 Number 2, the Singer 13 transaction, that is not a
14 search of their SWIFT system. They have been consistent in
15 saying they don't have SWIFT records that old, except on
16 backup. That is a search of the bank system in which in the
17 transaction type field, it said SWIFT. It was not a search of
18 the SWIFT fields or the SWIFT system.

19 Mr. Regard stated that -- this is in his first
20 declaration at 149 and 150. He had BOP conduct an inspection
21 of all SWIFT indicated tables and fields for data and data
22 ranges, and there were no responsive data.

23 So that after Singer 13 were produced, then they
24 went back on our demand to look for the SWIFT fields and the
25 entire evidence we have that they did that search is that

1 single statement for which we have no query or evidence or
2 anything.

3 MR. BERGER: Yeah, (indiscernible) is correct, Your
4 Honor.

5 MR. RADINE: I (indiscernible) search terms.

6 MR. BERGER: That's not really correct, Your Honor.

7 MR. RADINE: So I think -- and by the way -- Mr.
8 Berger, enough.

9 I -- El Reyes says that they only searched banks and
10 that that's where the ancillary table and the bank's tables
11 are held. I think that the sort of stream of misdirections
12 here is the clearest evidence of why we need an independent
13 vendor to run these searches with whatever protections is
14 necessary for BOP.

15 MR. BERGER: May I be heard, Your Honor?

16 THE COURT: Yes.

17 MR. BERGER: Yeah. Look, I -- this isn't in the
18 deposition, and I guess Mr. Radine -- behavior thinks that it
19 is, but let me point to some facts.

20 Paragraph 11 of the El Reyes declaration that was
21 provided to Your Honor with the surreply says, first sentence
22 and I'm quoting, "In 2017, the SWIFT system was electronically
23 integrated into the bank's core banking system." So we were
24 able, by searching the bank's system, to come up with whatever
25 SWIFT information was integrated from the SWIFT system, and

1 that is how we were able to produce SWIFT records to the
2 extent they exist in the SWIFT system.

3 What Mr. Radine is conflating, and he's mixing
4 apples and oranges here, are statements that our expert made
5 about backup tapes, not searches of the live system. The live
6 system has been searched.

7 The SWIFT system has been searched, the power card
8 system has been searched, the bank's system has been searched,
9 the ancillary table of historical information has been
10 searched. Mr. Regard, when he said he ran searches for SWIFT
11 information, is talking about backup tapes. He is not talking
12 about the live system in order to provide the information of
13 the type we've provided in SWIFT 13.

14 As to the backup tapes, I mean, that's a whole other
15 issue, which is, you know, our view is, we'll give them the
16 indexes, but their view is, you've got to read every book in
17 the library to know if the card catalog is correct, and that
18 is simply not correct.

19 Our expert looked at the indexes. They want to look
20 at the indexes, we'll give them the indexes, but we are going
21 to spend the next year quibbling over what ought to be done,
22 and that is not what limited jurisdictional discovery,
23 originally supposed to take four months, is all about.

24 I don't like the adjectives and the adverbs I'm
25 constantly hearing from Mr. Radine, but adjectives and adverbs

1 don't contradict facts. We searched these systems, we
2 produced this stuff. He is arguing over whether we should
3 have identified additional information that we have. I've
4 stated we'll give it to him.

5 MR. RADINE: All I can say, Judge, that again,
6 that's all wrong. They have been very clear that they did not
7 search the backup tapes. That statement from Mr. Regard I
8 read to you said SWIFT indicated tables and fields, referring
9 to banks.

10 We know they didn't search the backup tapes, because
11 they've gone to these extraordinary arguments about divining
12 some meaning from the field of metadata rather than from --
13 the field names and dates rather than just opening the files
14 themselves. It's an inappropriate process.

15 In fact, we just saw this case, *Rodman v. Safeway*.
16 This is 2016 Westlaw, 5791210. It reads, "It is not clear
17 whether Safeway's counsel ever determined Mr. Guthrie searched
18 within the contents of the files, the legacy drive, as opposed
19 to merely within the documents' names. Such lack of guidance
20 and oversight supports a finding of unreasonableness."

21 And that's at Star 3. That's the process they've
22 used so far in the backup tapes. We pointed out in our briefs
23 that their attempt to divine meaning from file dates is wrong.
24 We pointed out that it was surprising that they did not
25 understand the January 1st, 1970 date, did not show that a

1 file predated the relevant period, but that instead it was
2 just a default date used by the UNC system.

3 We've showed that the SWIFTNet Link system was
4 irrelevant. We showed that backup files definitionally are
5 created after the data they're backing up. And their response
6 to all of this is to fall back on simply repeating lines like,
7 well, the bank said they transferred all the data 20 years
8 ago, so that must be what happened.

9 We've made clear time and time again that their
10 search processes are not sufficient, and having them run them
11 again is not a good use of the Court's time or our time, or
12 resources.

13 MR. BERGER: Your Honor, if I could just have two
14 minutes to sort of recap what the bank did because again, I
15 think what you're hearing are things that are jumping from
16 live systems to tapes, et cetera. So let me just try to be
17 systematic.

18 The bank received the plaintiff's discovery request.
19 It created search terms. We have produced the search terms.
20 There's nothing shocking about the search terms. They are
21 both sort of direct and fuzzy translations of the names of the
22 entities they wanted.

23 We apply those to every live system to see whether
24 or not they contain responsive information. That included, I
25 am representing on the record, happy to -- and I'm putting my

1 reputation as an attorney behind this. We looked at all of
2 the live systems in the bank.

3 We have produced the queries, and I confess, I'm not
4 the world's greatest technology expert. I -- there's a
5 difference between the queries and the search terms, but we
6 have produced the queries.

7 How did the bank apply these to the live system?
8 Your Honor, literally there is a dialog box that comes up on
9 the screen of the computer to want to search to see account
10 records. The dialog box, we -- the single most uninformative
11 piece of information in the world. So when we thought, oh, I
12 guess we could given a screenshot of the dialog box.

13 But we said no, what we're going to do is we're
14 going to give them both a narrative explanation of how one
15 searches for these. That was the first query we produced.
16 And then we said, when we produced this, here is the software
17 that is coded to the dialog box that comes up on the computer,
18 so that when you plug in a computer name, this is how the
19 computer executes it.

20 So we had search terms that translated what they
21 wanted. We've produced the query that they wanted, we have
22 produced the software behind the dialog box that implements
23 the query. We have confirmed that we searched all of the live
24 records. We have given them the product of that. That is
25 what is the 250 transactions which will be augmented and will

1 have -- I suggested.

2 Then there are 39 tapes. We have used indexes to
3 winnow down the tapes. And Mr. Radine says we don't
4 understand the 1970 issue, it's a default date. Your Honor,
5 there are only three tapes that might potentially contain
6 SWIFT information. This is all set out in Mr. Regards's
7 declaration. Exabyte Tape No. 2, Exabyte Tape No. 6, DDS Tape
8 No. 4. Not one of those three involves this 1970 issue that
9 Mr. Radine wants to throw around. Every one of those three
10 tapes has an index that shows the dates of the data on those
11 tapes.

12 Exabyte Tape No. 2 has information that is only
13 after 2004. So it's only 2005 and later, other than 12 system
14 files, non-data files. Exabyte Tape No. 6 has 1 zero-byte as
15 opposed to -- that is an empty file from 2004. It has SWIFT
16 data, but the dates are 2005 to 2007. The 1970 issue does not
17 affect that tape.

18 DDS Tape No. 4 has SWIFT Alliance files from 1996 to
19 1998. I appreciate he wants to accuse of incompetence,
20 mendacity, and the like, but the fact is, we know what we're
21 doing and we did a good job, and there's no reason why because
22 they're frustrated, they should take this process over in the
23 way they've suggested.

24 MR. RADINE: It won't surprise the Court that I'd
25 like to respond to that.

1 So on the live side, not all that was true, but just
2 to focus on what happened. Some of that we received from
3 them. The queries, we only in April got a query that they
4 have yet to now take back and say they actually didn't use in
5 this matter.

6 We know it doesn't relate to the search terms. We
7 know that their queries are structurally broken in the sense
8 that they, as we set out in our briefs, don't seem to pull
9 transactions for one account on one system that they get for
10 the other.

11 So for instance, the Islamic Society query
12 transactions just stop right at the cut over, and then the Al
13 Salah ones start right at the other side of the cut over
14 already with a balance. We know that's not working right.

15 We know that the -- that they're not pulling all the
16 field data that we need. We asked for that. Asked for the
17 tapes. We have walked through this in the briefs, but if you
18 recall, their very good methods that they used involved them
19 starting by saying, well, you can set aside Tape 6 because it
20 just has one big file on it, and when we look at the file
21 manually on the screen, we see it's not data files.

22 When we say that doesn't sound right from a basic
23 computer competence kind of view, that looks like a TAR, an
24 archive file that contains many other files, what do you know,
25 we learn later that it contains 61,000 files.

1 Now of course, they won't let us see the index for
2 that. Now we just have to be assured that those files can't
3 be relevant because of their dogged belief that backups are
4 somehow made before data is created. That's not right. Or
5 that SWIFTNet Link files are relevant. That's not done right.

6 As for the DDS tapes, we see that they have knocked
7 out about half of them for the 1970 date. That's not right.
8 But looking even at the -- on Mr. Regard's table on those
9 tapes, we see under content that those 1970 tapes are marked
10 as Oracle. Oracle, the database, underlines SWIFT Alliance
11 access in banks. There is no reason to believe that those
12 don't contain the data files themselves.

13 We've seen on a previous document that they have 72
14 gigabytes of SWIFT data files that are sitting on Oracle.
15 There could be all manner of additional data like that sitting
16 on these tapes that are marked Oracle, or are marked DB2 or
17 dBASE. We have no idea why they're excluding those. They've
18 never said why. That's a valid database.

19 What we get here is not an attempt at transparency
20 and cooperation. We get here a tortured attempt to avoid
21 doing normal cooperative production procedures.

22 MR. BERGER: If I may be heard, Your Honor. I have
23 one more suggestion maybe that will move the ball forward, or
24 at least I hope it will.

25 You know, he says this process isn't working right

1 because there are gaps in the data. Well, there are gaps in
2 the data because there are gaps in the data. I mean, that's
3 the only historical information.

4 But here's my suggestion. When we were last
5 together on February 22nd, when they asked for permission to
6 file the motion to compel, I told Your Honor, you can find it
7 in the transcript, it's quoted in our surreply, that we were
8 having Sullivan Strickler do indexes of the tapes. We said
9 that work ought to be completed before they file a motion to
10 compel, and they said, no, no, we want to move right away.

11 So from our standpoint, they have completely jumped
12 the gun in bringing this motion to compel before Your Honor.
13 One of the items on Mr. Radine's wish list is the indexes that
14 Sullivan and Strickler was in the process of preparing when
15 they came to the Court the last time. So my suggestion is the
16 following.

17 We will produce the indexes. We will reproduce the
18 spreadsheets. We will create an affidavit that explains the
19 information that is on the spreadsheets.

20 Your Honor, we'll direct the parties to meet and
21 confer further, after they have reviewed the indexes, and then
22 make to us a concrete proposal of what they want to do next,
23 rather than sort of having to run into the court prematurely
24 and say, you know, we don't like the way it's going, even
25 though we never asked to meet and confer over search terms and

1 the like in the front end, and therefore take it out the hands
2 of the parties and give it into the hands of an independent
3 vendor, and let's come back and speak to Your Honor in 15
4 days, 30 days, and see if we can't narrow this somewhat
5 because this all or nothing approach that either we have to do
6 it the way they want to do it or, you know, Your Honor has to
7 decide sort of in a bit of a vacuum, whether there's more to
8 be done.

9 We think we've done more than enough, but we're
10 prepared to go even further and then do this in a more
11 systematic way, because I frankly don't understand how the
12 Court could possibly decide that enough has been presented at
13 this point to take the process candidly and appropriately out
14 of the hands of Bank of Palestine, when we have done
15 everything that a party is supposed to do in discovery.

16 THE COURT: All right. Well, let me ask you a
17 couple of questions. Mr. Radine, you say that you haven't
18 received all the queries and the search terms.

19 Would -- is there a way in the process that Mr.
20 Berger has suggested that you can clarify the dispute over
21 that and perhaps resolve what's been turned over and what
22 hasn't and what's missing? Is that something that this meet
23 and confer could help with?

24 MR. RADINE: Well, we would appreciate, of course,
25 them producing all the search terms and the actual queries

1 they used. We will need -- I don't know if Your Honor saw the
2 queries. We need schemata to understand them.

3 They are limited value on their own because the way
4 relational databases work, we quoted the *Sedona Conference* on
5 this, is that without knowing for instance which fields feed
6 into another field, then being told that it is querying that
7 field is insufficient information. With the queries and the
8 search terms and the schemata, it's an important step, then,
9 and we'd obviously have a lot of feelings about how additional
10 search terms would be deployed and more appropriate queries,
11 yes.

12 THE COURT: All right. So we can build that into
13 the process. Mr. Berger, do you agree?

14 MR. BERGER: Yes, Your Honor. I mean, I will -- I
15 will -- just to repeat what I said at the outset, we believe
16 we've given them the search terms and queries, so the meet and
17 confer would certainly give them the opportunity to tell us
18 what they think is missing.

19 We've told them, for example, the old Legacy system,
20 that there are no schema, but yeah, we can have that
21 conversation. We have no resistance to producing search
22 terms, queries, or schema, and that is something we can
23 productively cover in a meet and confer.

24 And if then they want to say, you know, we've looked
25 at your search terms, your queries, and your schema and we

1 would like you to run these additional search temrs, then
2 okay, you know, we're open to that too. Our goal here is to
3 prove what we think is the case, that when you look at all the
4 transactions there's not enough for jurisdiction. So we're
5 not resisting.

6 We're trying to tell them that we've given them what
7 we think we have. If they think there's something more and
8 they want to explain to us how we can get to that something
9 more, then we'll listen to what they have to say on that
10 subject.

11 THE COURT: And have you provided all the
12 information from Sullivan and Strickler that you have at this
13 point so that plaintiffs can evaluate it?

14 MR. BERGER: We will give them the indexes. That --
15 those indexes were being prepared at the time we spoke. I'm
16 happy to give them the indexes. That's the 196,000 lines of
17 text that I mentioned earlier when I said at the outset, when
18 they gave you a wish list. We'll give them that as well.

19 I mean, I don't know how they're going to get
20 through it in time to have a meet and confer any time in our
21 lifetime, but they seem to have an expert who will help them,
22 so we'll produce that stuff, we'll have a meet and confer,
23 we'll see if we can't narrow our differences.

24 It seems to me that that is a whole lot better than
25 sort of this notion that they've had enough, they're fed up as

1 they've express repeatedly in their very heated language, and
2 therefore, the only thing that can happen is an independent
3 vendor needs to take over. We object to that and we would
4 have to resist that.

5 It seems to me the easier way here is to just give
6 them these additional items, we -- most of which we think
7 we've given them, have a meet and confer, we'll reconvene with
8 Your Honor.

9 THE COURT: Well, I don't have a problem with the
10 step-by-step approach.

11 Mr. Radine, the way it's been defined for the
12 Sullivan Strickler indexes and documents, does that work for
13 you?

14 MR. RADINE: I'm afraid not, Your Honor, for a
15 couple reasons. First of all, this doesn't help us. I mean,
16 having the indexes of the tapes would not resolve actually
17 searching the tapes.

18 And while the indexes are useful, if they had -- by
19 the way, as you saw in our briefing, (indiscernible) these
20 lists as well, that would have been helpful for us to review
21 them since they're so long.

22 But this ship has sailed for us. In terms of BOP
23 saying, you know, sure, we withheld these materials, we relied
24 on the Sullivan Strickler indexes without producing them in
25 our briefing, but now we'll cooperate, this ship has sailed

1 for that. There's no indication we have that the last year of
2 these obfuscatory tactics are remedied now.

3 And I don't think it's premature. I find it ironic
4 that Mr. Berger complains that the discovery process had gone
5 beyond the original four months, and yet now our request is
6 premature. I don't have the sense that this is -- while I
7 think it's all necessary steps and all great that they're
8 produce, I still don't understand why they're so opposed to
9 having someone properly resolve this. They've represented
10 that they want it properly resolved. They have yet to be able
11 to do that, and we have proposed our process for making sure
12 that it actually happens.

13 MR. BERGER: Your Honor, if I may be heard?
14 Respectfully, I don't think that being an angry man is a legal
15 argument, and it's just not helpful.

16 I could be saying in equally impassioned terms, that
17 the bank has done what any defendant is required to do and has
18 frankly gone beyond. Their complaints are not about
19 substantive discovery. They've had, since June and July of
20 last year, 250 transactions, the import of which they could
21 have been arguing about on a renewed motion to dismiss for
22 jurisdiction.

23 Since that time, everything has been about changing
24 the subject to discovery about discovery. We could have
25 resisted discovery about discovery and said, discovery about

1 discovery in general is inappropriate. And yet, we have
2 indulged them for a year in discovery about discovery to prove
3 to them we are not hiding things. It is not enough to simply
4 raise your voice, call people names, and say that's a
5 substitute for reasoned analysis.

6 We think we should have been done a long time ago.
7 The spreadsheets tell them what they need to know for us to
8 litigate the motion, but we're prepared to continue this
9 discovery on discovery dialog by giving them this additional
10 information. I don't care whether he thinks the ship has
11 sailed, the train has left the station, whatever other
12 metaphor he wants to use, the reality is, they're not entitled
13 to it just because they're frustrated and annoyed.

14 THE COURT: All right. I'm not sure that
15 (indiscernible) the discussion once you're there. What I'm
16 looking for is a way to test whether or not what each side is
17 saying is correct. I mean, each of you says we can't really
18 trust -- well, the plaintiff is saying, we can't really trust
19 the BOP at this point, and BOP says that plaintiff is asking
20 for everything and it should be trusted.

21 Is there some kind of a sampling that can be done to
22 test the hypothesis that the plaintiffs have at this point?

23 MR. BERGER: My suggestion -- I'm sorry, Your Honor,
24 if you want to hear from Mr. Radine first, that's fine. I'll
25 desist.

1 THE COURT: Yeah. Mr. Radine.

2 MR. RADINE: In terms of searching banks?

3 THE COURT: Well (indiscernible) bank --

4 MR. RADINE: (Indiscernible).

5 THE COURT: Yeah. Go ahead.

6 MR. RADINE: Well, they won't -- they won't load and
7 search the tapes, so it wouldn't be from the tapes. It would
8 just have to be -- so it wouldn't be from the SWIFT Alliance
9 access system for the -- unless we can load those, which would
10 be great. I think that's obviously the independent vendor
11 route.

12 As for banks, then -- as in us proposing more
13 searches to them, and it sounds like their proposal for the
14 further meet and confer process, but no, we think that has
15 probably limited utility.

16 MR. BERGER: So, Your Honor, I -- you know,
17 obviously you're the one whose views matter here. My
18 suggestion to synthesize everything I've said and to add one
19 other quality check if Your Honor would like, which is, we'll
20 produce the indexes. We will create an affidavit. That's
21 going to take a little bit of time, but we'll create an
22 affidavit. We would have done it for our motion to dismiss
23 anyway. We will reproduce the spreadsheets with the
24 additional information. The parties should meet and confer.

25 If as part of that meet and confer, they want to

1 give us some additional searches, and they want to run as a
2 way for them to test whether everything I've said to Your
3 Honor is correct, everything our experts have said to Your
4 Honor, that's correct, that's fine.

5 And when we resume, if Your Honor wants, we'll bring
6 our IT expert to the hearing and Your Honor can ask our IT
7 expert whatever questions Your Honor might want, and they can
8 do the same with theirs, and then Your Honor won't have this
9 all filtered through a bunch of attorneys who think they know
10 something about IT, and I'm the first to confess that I'm no
11 expert.

12 But I want Your Honor to have access to whatever
13 resources are necessary to answer these questions. But it
14 really does seem to me that they -- that there's a huge
15 element of gun jumping here that needs to be avoided.

16 That's when I say premature, which is, we don't
17 think it's premature to renew the motion to dismiss, but it is
18 certainly, when you move out of the substantive realm and into
19 the realm of discovery about discovery, it is premature to
20 jump to this sort of absolutely end-game idea of having an
21 independent vendor when these -- these issues, for all of
22 their apparent, you know, supposed complexity, these are --
23 this is day-to-day discovery stuff.

24 There's nothing here the parties can't get to the
25 bottom of, or at least narrow their differences, rather than

1 getting to this notion that okay, the process has failed,
2 let's call an end to it, put a fork in it, it's done, we're
3 going to bring in an independent expert.

4 THE COURT: Well, I think plaintiffs are saying that
5 they don't have all the data that they need in order to --

6 MR. BERGER: Yeah, well, we --

7 THE COURT: -- (indiscernible).

8 MR. BERGER: -- Your Honor, I -- well, and I think
9 what they've identified as what they need is -- we've said,
10 either we think they have it and need to understand why they
11 think they don't, or they want the Sullivan indexes, which we
12 were in the process of preparing back in February, and we'll
13 give them those. Okay?

14 They want to read 196,000 lines of text, which is
15 what our expert has had to go through, and they want to run
16 tests on it, fine. They're going to find the same things we
17 found, which is that most of these tapes -- and that's what
18 these indexes are about. It's not about the live systems.
19 These tapes are garbage. That to the extent they have SWIFT
20 data, there's only three of the 39 tapes that might. They
21 don't -- they're either old; they're too old, or they're too
22 new. Simple as that.

23 And two of the three tapes are backups of a live
24 system. So why would one think if they're backups of the live
25 system, that they would contain any more information than is

1 already on the live system, but okay. They'll get the indexes
2 and they'll see for themselves.

3 THE COURT: What about the 26 HP tapes that may
4 contain backups of the legacy system?

5 MR. BERGER: Those are part of the indexes. So the
6 indexes that have been run are of all 26. There's only one.
7 That's how we determined that only one of the 26 had Alliance,
8 which is the, sort of the synonym for SWIFT data on it, but
9 the indexes are there, and the indexes are there for the two
10 Exabyte tapes, which are backups of the live system that have
11 been the product of earlier meets and confers discussed in the
12 parties' affidavits as potentially containing SWIFT
13 information.

14 We'll give them the indexes. Okay? I mean, as I
15 said, you know, my analogy was, they want the card catalog,
16 it's great. This notion that we have to read every book in
17 the library because, you know, we're not sure the card catalog
18 is correct, that's just not the way discovery should be done.

19 THE COURT: And where do the Sullivan indexes fit in
20 with the 26 HP tapes?

21 MR. BERGER: So the indexes are the 26 HP tapes.
22 They are the one that's the line-by-line index. They're
23 further indexes beyond just the 26 of the two Exabyte tapes.
24 In other words, live system backup tapes that everybody
25 thought might contain SWIFT.

1 You may remember almost a year ago we were talking
2 about, we recovered data, recovering tapes, so they were not
3 able to fully recover these 13 Exabyte tapes, but there were
4 two of those 13 that everybody thought might have SWIFT data.
5 We had Sullivan and Strickler index those.

6 I'm going to ask Mr. Alonzo if I'm getting this
7 wrong, just to correct me, because I don't want to misstate
8 anything. But as the separate 26 historical backup tapes of
9 whatever type they were, we had all 26 indexed, and they can
10 have the index.

11 THE COURT: And the Exabyte Tape 6 -- is that --
12 what is that included?

13 MR. BERGER: So Exabyte Tape 6, we do have an index
14 of it. That's how we were able to tell the Court in our
15 affidavits that it does have SWIFT data. The SWIFT data
16 covers the time period, 2005 to 2007. It has one zero-byte
17 file in it from 2004. So there is an index of that and they
18 can have that as well.

19 You know, for Exabyte Tape No. 2, it has no SWIFT
20 data. It has 12 system files from 2004 that are not data
21 files. They can have the index of that.

22 I'm -- I know there's a lot of jargon here, but I'm
23 just trying to sort of put these into the appropriate pigeon
24 holes in the desk here so we know what we're talking about.
25 But to the extent we have the indexes, they can have the

1 indexes.

2 THE COURT: Mr. Radine, I think we're probably going
3 around in circles a little bit, but if you have those indexes
4 or indexes, what more do you need that you don't have?

5 MR. RADINE: So the problem with the -- getting the
6 indexes of course is crucial. We need, as you said, the
7 Exabyte tape indexes, and the 26 DDS Tape indexes.

8 But you can see that we're already disagreeing on
9 information we already know about the tapes. So BOP has
10 routinely repeatedly said the SWIFT backup files are from
11 2005/2007. We keep saying, right. That -- a backup you do in
12 2007, for instance, has a created on date of 2007 and contains
13 all the data that was on the system at that -- in the previous
14 period. Right? If you did a -- banks right now, banks have
15 data from December 2002 to the present, so the active system.

16 If you made a backup of it right now, that backup
17 would be dated May 25th, 2022, but it would have data going
18 back to 2002. Right? So BOP would have excluded that file
19 because they would say, oh, it's from 2022. You're looking
20 for historical data.

21 The reason why I'm going through this is because,
22 while I'm sure the indexes will be very helpful and we need
23 them, but we are already disagreeing on the interpretation of
24 them.

25 THE COURT: Well, it also sounds like you're

1 disagreeing on the scope too. I mean, at least the time line.

2 So, Mr. Berger, is that correct? Is there -- when
3 you talk about the dates of the tapes, are they perhaps
4 including -- even though they may have later date stamped on
5 them or whatever, do they include data that's much earlier,
6 and so would you object to producing that?

7 MR. BERGER: I guess what I'm saying is, it's not
8 just so they have a date stamp on them. They have file path
9 names and the like, and for example, Exabyte Tape 6, we'll
10 take that as an example. That's the one that covers two -- it
11 has a beginning date of 2005, has an end date of 2007. It is
12 a duplicate of the live system, so there's no reason to
13 believe that it has anything on it that is not on the live
14 system.

15 Let's just take that as an example. They'll get the
16 index. They'll say, well, we have this hypothesis, which is
17 all Mr. Radine is giving you, a hypothesis that maybe, even
18 though it says the date is 2005 to 2007, that it could contain
19 something earlier. So fine. They'll give us a search query.

20 Can you run this query on that tape to test my
21 hypothesis that number one, it contains data from an earlier
22 time period. Number two, it contains data that is not
23 duplicated in the live system that this backs up.

24 When he talks about that, that is a very different
25 kettle of fish than looking at DDS Tape No. 4, which is, these

1 are the ones that frankly might have some promise, which is
2 why we spent so much time on it. These are the old system.

3 Why we're wasting time looking at tapes that back up
4 the live system doesn't strike me as very productive. Tapes
5 that have the old system. Okay. So we found one that had
6 data from 1996 to 1998. Well, it's just not possible that a
7 1996 to 1998 tape has data from 2000 to 2003. It's just not
8 possible.

9 And so, he has a little fluidity here in the way
10 he's using dates, but fine. They'll look at the index.
11 They'll say, this file intrigues us, can you retrieve that
12 actual file, as opposed to, let's empty out the library, let's
13 get all the books out on the street and then restack them in a
14 way that makes me comfortable that we've looked at the card
15 catalog index.

16 So there are ways to test these things once they've
17 looked at the indexes, rather than Mr. Radine rejecting every
18 suggestion we have made as saying, not good enough, we don't
19 trust them, we don't want to do it, no, we just want to have
20 somebody else take this out of our hands. That's overkill.
21 We resist that.

22 THE COURT: All right. But it sounds as though
23 you're going to have a meet and confer that the plaintiffs
24 will be able to review some data and they can then make
25 requests for queries, and then if that's not satisfactory,

1 you'll be back to me on -- and one of the remedies that the
2 plaintiffs are going to propose is independent vendor. You're
3 going to propose that. I get it.

4 What about the bank subpoenas? There was some
5 suggestion that the banks have nothing. What -- are you still
6 resisting these bank subpoenas, and I know there's also a
7 question about whether or not you can, you have standing to do
8 so. But what's your position, Mr. Berger, on the bank
9 subpoenas?

10 MR. BERGER: Yeah. I can do that very quickly, Your
11 Honor. I mean, we have been told that -- by two of the banks,
12 Citibank and JP Morgan Chase, they have nothing. I would
13 prefer that they respond to the subpoenas and tell the
14 plaintiffs they have nothing.

15 Now, these are the plaintiff's subpoenas, so they
16 haven't told us whether they've received anything in response
17 to the subpoenas.

18 The one bank we've not heard from and have nobody to
19 contact, is the MUFG Union Bank, and perhaps plaintiffs have
20 heard from them.

21 And my only put there is, again, these subpoenas --
22 our problem with them is not if they have the kind of
23 transactional information. Our problem is, is they say, give
24 us the entire transaction history of this bank, Bank of
25 Palestine. You know, that's what we're opposed to.

1 But if -- but I haven't heard from the third bank.
2 If they've got documents, I'd like to know what that third
3 bank has.

4 Other than that, we think they're moot. The
5 subpoenas are moot because JP Morgan Chase and Citibank have
6 nothing.

7 MR. RADINE: So, just to fill in --

8 THE COURT: Yeah. Mr. Radine, go ahead. Do you
9 have an issue with --

10 MR. RADINE: Okay.

11 THE COURT: -- the subpoenas?

12 MR. RADINE: So the bank that BOP called their
13 primary correspondent bank, JP Morgan, has refused to
14 participate further given BOP's motion for protective order,
15 so that has stalled right there.

16 THE COURT: All right. So let me stop you there.
17 So, Mr. Berger, it sounds as though you're happy to have JP
18 Morgan Chase respond. Is that correct?

19 MR. BERGER: Correct, Your Honor. Yes, correct,
20 Your Honor.

21 THE COURT: Can you communicate that to JP Morgan
22 Chase?

23 MR. BERGER: I'll do so, Your Honor.

24 THE COURT: Okay. All right. Go ahead, Mr. Radine.

25 MR. RADINE: Yeah. I appreciate that Mr. Berger

1 will do that. What we understood from JP Morgan is they
2 wanted an order on the motion for protective order. So, you
3 know, we can -- you know, that --

4 THE COURT: Well, Mr. Berger, are you saying that in
5 fact you're withdrawing that -- any portion of the motion for
6 a protective order that has to do with the subpoena to JP
7 Morgan?

8 MR. BERGER: I can't do that, Your Honor, because
9 our scope objection is the one that says their subpoenas are
10 over broad. If -- you know, if Your Honor were to enter an
11 order that says JP Morgan Chase, Citibank -- is the two I've
12 personally spoken with the lawyers for both of them -- shall,
13 you know, respond as to whether they have any responsive
14 documents, we submitted an affidavit confirming what they told
15 us, which is they have none, then that's -- you know, a minute
16 order to that effect will allow me to figure out whether
17 they've miss -- you know, mysteriously, they've got something
18 else.

19 Our problem is not with subpoenaing the banks. Our
20 problem is that the scope of what the plaintiffs asked. If
21 the plaintiffs want to reissue subpoenas -- maybe this is a
22 suggestion that would work.

23 They want to reissue subpoenas that don't ask for
24 the entire correspondent account banking history of Bank of
25 Palestine for this period, but ask instead for things that

1 emulate their first request for production of documents, funds
2 transfers through the United States for the subject entities,
3 then we'll withdraw our motion for protective order because
4 those subpoenas fit the appropriate scope.

5 THE COURT: Mr. Radine?

6 MR. RADINE: Well, yes. Obviously, we oppose that.
7 The two scope objections they have, they don't have standing
8 for either as the Court knows. But the two scope objections
9 very briefly. Their first one was date related. The other
10 one was the -- what they call the entire correspondent history
11 is a request for bank statements.

12 So the reason for the period beyond the last attack
13 is because if there aren't records going back before that,
14 which there might not be due to their age, then what we are
15 trying to show is that BOP processes its transactions at issue
16 through New York is -- you saw in Mr. Berger's argument that
17 the attacks did not arise from post-attack transactions.
18 Right. That's not what we're saying.

19 What we're saying is, we're trying to establish how
20 BOP processes U.S. dollar transactions for entities like
21 these. It's still limited to the Hamas entities. To be able
22 to say, look, how did they process a transaction for Al Salah
23 in 2002? Well, look at how they did it in 2004. The
24 inference is, they would have done it in the same manner
25 unless they can show they changed some processes in that

1 period.

2 The second one was the bank statements. The bank
3 statements is something they said they would have looked at
4 first. Bank statements may express this information
5 differently. It may list the counter-party. It may say that
6 you have an entry that doesn't list one of the Hamas entities,
7 but it says, check settlement payment to PMA. That's the sort
8 of thing that we would suggest you could read along with other
9 data, such as checks they process for these entities to say
10 that the checks were settled in New York.

11 We're not interested, obviously, in the sum total of
12 BOP's banking -- correspondent banking activity during that
13 period, but we're trying to find documents that might still
14 exist. Bank statements might exist, for instance, where
15 individual transaction records don't, by way of example.

16 MR. BERGER: If I may be heard on that? I mean,
17 that's the problem. Mr. Radine has put his finger on the
18 problem, which is he says they're not interested in the entire
19 BOP correspondent bank history during the time period.

20 But when you ask for a bank statement -- he asked me
21 for my bank statement for a four-year period. That is my
22 entire banking history. There has to be a way for them to
23 narrow these subpoenas so that it asks for information that
24 actually fits the scope of discovery. When we said we would
25 have looked at them, yeah, we would have looked at them. We

1 wouldn't have turned them over, we would have looked at them
2 for responsive transactions.

3 So if there are customers that have nothing to do --
4 the U.N. Food Program, there are transfers to the U.N. Food
5 Program through the correspondent account history. They can't
6 possibly either believe that that's jurisdictionally relevant,
7 or say that they're entitled to that, because these are the
8 types of customers that Bank of Palestine services.

9 And so, they need to narrow their subpoenas. Then
10 we can say, that overtakes the other subpoenas, that moots the
11 motion for a protective order, they ought to draft these
12 subpoenas. You know, we're doing a lot of work here to get
13 ready for the meet and confer. All they're doing is sitting
14 there and saying, their wish list is still big.

15 They ought to redraw their motion for -- they ought
16 to redraw their subpoenas. They ought to show them to us in
17 the meet and confer. They ought to reserve them if we can
18 agree on them, and then that will moot that, and then there
19 won't be a pending motion for protective order.

20 In the meantime, I will ask the assistant general
21 counsel to whom I spoke at JP Morgan Chase, and ditto the
22 assistant general counsel to whom I spoke at Citibank, if they
23 can communicate in some way to the plaintiffs that they do not
24 have responsive records relating to these correspondent
25 accounts for this time period, then that will save everybody a

1 lot of work. I can't control what they do. I would prefer
2 that they say it so you don't have to take my word for it.

3 MR. RADINE: Just to be clear, I can't -- I can't
4 write a subpoena -- so the burden of, let's say redacting
5 irrelevant information out of the bank statements is a burden
6 that would fall on the banks not to BOP.

7 It's not BOP's burden. I don't know if they could
8 write a subpoena that says, you must give me bank statements,
9 but you also must redact them in a way that pleases BOP. It's
10 a specific document we're requesting because it's a document
11 that would contain relevant information.

12 THE COURT: Well, but what could be done is you
13 could have the information go to BOP first, and then BOP can
14 say whether there's -- it might be that BOP might be able to
15 settle the problem once it's gotten all of this information.
16 Either it could redact, or it could say that there's nothing
17 there that exists. Would that work?

18 MR. RADINE: Yeah. I mean, ordinarily records
19 contain both relevant and irrelevant information, and usually
20 the -- where there's no particular prejudice, the other party
21 doesn't get to then go through and redact out information that
22 they just think is irrelevant. It's not -- the other issue --
23 and they don't have standing, of course, to do that.

24 And then lastly, of course, we have the issue where
25 we clearly disagree on what's relevant. We already have had

1 that discussion about the check clearing that would show up on
2 these bank statements.

3 So we can certainly mention to their correspondent
4 bank that they are free if they want to, to redact out
5 information on some agreed-upon standard. But I don't think
6 it's something that we can order them to do, or that we would
7 ordinarily agree to having the defendant in the case do to a
8 third-party document. Again, where there's no -- there's no
9 prejudice.

10 The U.N. Food transactions they're doing, I don't
11 know how it prejudices them if we were to see that. There's a
12 protective in this case in place anyway.

13 MR. BERGER: Well, Your Honor -- and Mitchell Berger
14 for Bank of Palestine. I mean, almost by definition we put
15 this into our briefing on the motion for protective order.
16 Banking information is not -- should not be seen by others.

17 I don't care about the protective order because they
18 still see it. They are not entitled to look at banking
19 information that does not relate to the issues of whether or
20 not the bank transferred for allegedly Hamas related entities.

21 But again -- look, for an hour and a half I've
22 listened to Mr. Radine say in response to either my suggestion
23 or the Court's suggestion that it's not good enough, no, no,
24 no, and frankly, they need to do a little work themselves,
25 rather than just sort of putting their palm out and say, give

1 me more.

2 And they can either narrow these subpoenas. I will,
3 in the meantime, get on the phone with the -- with Mr. Gabriel
4 Torres from JP Morgan Chase who told me they have no records,
5 and Ms. Kirsten Fiore from Citibank, who told me they have no
6 records, and I will ask them to communicate to plaintiff's
7 counsel that they don't have responsive records relating to
8 these correspondent accounts for the years covered in their
9 subpoenas, and maybe that will simplify things yet again.

10 THE COURT: All right. Well, that will be the
11 easiest way if in fact that's the case.

12 All right. So let's set up the time table and then
13 a date for another conference after you've done this.

14 MR. RADINE: Well, sorry, Your Honor, we still have
15 the interrogatory issue open. We still want answers to those
16 interrogatories from BOP.

17 MR. BERGER: Yeah. On that one, Your Honor, this is
18 one that I think is a -- sort of a black and white issue,
19 which is, they're not entitled to account information. That
20 is merits discovery.

21 If it happens, as was the case in the Singer 1
22 through 13 spreadsheets, that there are transactions within
23 the accounts, and we've told them what the account numbers are
24 for the accounts that have transactions. But if there are
25 accounts that do not have dollar transactions, they're not

1 entitled to the account numbers.

2 They're not entitled to account opening -- how on
3 Earth could account opening documentation and the like, and
4 all of that activity that they want with respect to accounts,
5 how could that relate to the jurisdictional issue of whether
6 or not there are transactions to the United States? I know
7 that they would like to get away from what Judge Vitaliano
8 ordered, but it has nothing to do with it.

9 So what they're talking about is interrogatories
10 that ask for three things that are totally outside the scope
11 of discovery.

12 Account information unrelated to transactions,
13 information that post-dates, by their own definition, the
14 relevant time period, and information regarding know your
15 customer AML type screening of customers that again has
16 nothing to do with the United States, although I'll represent
17 that if there were something having to do with transfers to
18 the United States of the know your customer, anti-money
19 laundering variety, we would produce that.

20 But this is just plain old merits discovery that
21 they want. And, you know, there's no reason -- we think we're
22 right about it. They think they're right about it. No reason
23 to rule on that today, because this is supposed to be
24 transactions focused, and we can come back.

25 We can talk about that some other time, but on that

1 one, we think we're absolutely right. We think that is one
2 that is a pure matter of law. You know, it's got to mean
3 something that Judge Vitaliano said transactions. And
4 transactions are not the same as accounts.

5 THE COURT: All right. Well, Judge Vitaliano's
6 order was that jurisdictional discovery be reasonably tailored
7 to the jurisdictional issue of whether BOP engaged in frequent
8 and deliberate use of New York banks during the time period,
9 et cetera. It may well be that -- well, Judge Vitaliano
10 didn't specifically limit discovery to only a period of time
11 between December 2001 and August 2003.

12 Discovery is -- obviously, in this case when we talk
13 about proportionality, there's a lot -- this is not a typical
14 case. But I think that there are ways that the
15 interrogatories can be answered that are broader than what BOP
16 is talking about and that can still protect the discovery
17 process.

18 So I'm inclined to -- I'm inclined to be -- I'll
19 take a -- I'll take a look at this again. I'll try to keep an
20 open mind about it, but at this point I think that the
21 plaintiff's arguments are persuasive to me in the -- to the
22 extent that we're talking about discovery at this point.

23 If it's not admissible, you can't -- and it can't be
24 used, or Judge Vitaliano decides it's not relevant or useful
25 for motion to dismiss, that's one thing. But I think given

1 plaintiff's access to more information than has been produced
2 in the interrogatories is the way to go here.

3 Now, I can wait until the next conference to be more
4 specific about that, but just to give you a general sense of
5 where I'm tending on the interrogatories.

6 And, you know, as far as the account information
7 goes, I don't think that there's a privilege there that I've
8 heard, or -- and I do think that our protective orders can
9 protect account information.

10 So what I -- what I'd would like to do then, is set
11 up a date for the next conference. I don't think we need to
12 wait too much longer.

13 How much -- how much time does the plaintiff need in
14 order to do whatever you have to do to review all the data
15 that has just recently been produced to you?

16 MR. OSEN: Your Honor, this is Gary Osen for the
17 plaintiffs. Just to address that and to go back for a moment.
18 I promise, I won't belabor the point on the interrogatories.
19 But the reason those are relevant, even to the meet and confer
20 process, is that it helps establish parameters of what the
21 potential, you know, total universe of accounts are.

22 And obviously, this doesn't require production of
23 anything, but it sort of sets the table for what accounts
24 they're actually searching for, whether accounts are relevant
25 or not. So I think having that information would be

1 incredibly useful to the meet and confer process.

2 As far as the -- as far as the actual conference
3 with Your Honor, I think the first step is for the defendant
4 to, number one, produce the indexes, the schema, and the --
5 and the dictionary, so that we understand what we're looking
6 at. And of course, at the same time, we can confer with them
7 in the hopes of finally getting the complete search terms and
8 search queries that they've used to date.

9 And I think it doesn't make sense, frankly, in our
10 view to schedule the conference itself until those materials
11 have been produced and we've had, you know, at least a week or
12 so thereafter, maybe two weeks, in order to simply just
13 evaluate what the universe of materials we haven't seen yet
14 constitute.

15 And then basically two weeks after we've gotten the
16 production of all that, we can, you know, jointly write a
17 letter to the Court suggesting a proposed conference date.

18 THE COURT: Okay. That will work from my
19 perspective. Does that work for you, Mr. Berger?

20 MR. BERGER: On the substantive point about the
21 interrogatories it doesn't work, only -- and -- but I'll get
22 to the scheduling point if I may? Their interrogatories about
23 accounts are worded -- I'm looking at 1 through 7 -- state
24 whether Bank of Palestine has ever maintained an account or
25 accounts for X entity.

1 It can't possibly be relevant to jurisdictional
2 discovery whether we have quote/unquote, ever maintained
3 accounts for them. It ought to be during the relevant time
4 period. How could it matter if we had an account for an
5 entity in 2005 or 2006, or if we had an account --

6 THE COURT: Okay. Let me just interrupt you there,
7 yeah, and I understand your point.

8 So in the subpoenas, the relevant time period was
9 generally 1/2000 to December 31, 2004. I don't have the
10 interrogatories in front of me. Is that the time period that
11 you're looking for in your interrogatories as well?

12 MR. BERGER: Well, we would just ask that it be cut
13 off in August of 2003. But for purposes of the
14 interrogatories if -- you know, if they want to talk about
15 2004, since we already have one account that was identified
16 that we've acknowledged in an affidavit from 2004, the
17 interrogatories that relate to the accounts, I believe, are
18 Number 1 through 7, and we've already made it clear as to some
19 of them that we did maintain accounts because we produced
20 transactions for them.

21 So we're only talking two or three interrogatories.
22 If 1 through 7 are limited to 2000 and 2004, it's fine. We
23 can answer those interrogatories.

24 THE COURT: All right. Does that work for the
25 plaintiffs?

1 MR. OSEN: Well, there are two issues, and maybe my
2 colleague, Mr. Radine, will address one of them. But you
3 know, I have less of an issue with a cutoff of 2004 than I
4 think we have with the period before 2000.

5 And that's because, although it may be completely
6 moot and unresponsive, from our perspective, just to give a
7 hypothetical, Your Honor, assume that one of these accounts
8 received a \$500 million transaction in 1998 or 1999.

9 We would then have a question about whether that
10 constituted substantial assistance to Hamas during the
11 relevant period. Obviously, a transaction for \$5 would
12 probably not qualify. But we're much more concerned about
13 artificially cutting off the earlier period than we are the
14 period after 2004.

15 MR. BERGER: If I may just address that? I mean, I
16 think Mr. Osen's comment puts the finger on the problem. He
17 said, that would constitute substantial assistance, and we all
18 know that substantial assistance is the operative language of
19 just the aiding and abetting, which is the one claim they
20 brought here.

21 That's merits discovery, and you've got to be a
22 difference, the merits discovery and jurisdictional discovery,
23 and it's transactions have to arise -- the attacks have to
24 arise from transactions. And the attacks for 2000 to 2003.

25 So, you know, we're prepared, as I said, despite

1 that, we'll answer the interrogatories going to 2004. If they
2 think there's some treasure trove of information before 2000
3 that's jurisdictionally relevant and I haven't heard it, then
4 this notion that it's open-ended on the back end, that's got
5 to be completely wrong.

6 It makes a mockery of the arising from component of
7 jurisdiction. They want to ask us 1999 to 2004, that's fine.
8 You know, it can't be the jurisdictional discovery is just the
9 sort of the thin edge of the wedge that opens the door to
10 merits discovery.

11 THE COURT: Yeah, I understand what you're saying.
12 So with that, Mr. Osen, 1999 to 2004. Does that work for you?

13 MR. OSEN: Yeah. I think that would be fine, Your
14 Honor. And again, we're only asking for interrogatory
15 responses. We're not asking at this stage for them to sort of
16 open up all records, even for 1999, because this is just about
17 responding to the interrogatory, identifying the accounts so
18 that we are better able to meet and confer and know what the
19 universe of potential responsive records might be, and what is
20 appropriate for search purposes.

21 THE COURT: Okay. So I think we've resolved that.
22 So are we okay on the interrogatories now?

23 MR. BERGER: Bear with me, Your Honor, just one
24 second.

25 It says, if so -- if the answer is yes, state the

1 account number, the currency in which the funds were
2 denominated, and the date each account was opened, and if
3 applicable, when each account was closed. That's more
4 information than they need for jurisdictional purposes.

5 If the answer is, we had accounts, then -- during
6 that period, then that's fine. Then they need -- then they
7 know what they need to know for purposes of the meet and
8 confer that they say this is really all about.

9 THE COURT: Look, Mr. Osen --

10 MR. BERGER: This is not a mystery. Go ahead. I'm
11 sorry.

12 THE COURT: Yeah. Mr. Osen, what if anything more
13 do you need than identifying whether there's an account?

14 MR. OSEN: Well, I think we'd be satisfied, Your
15 Honor, with knowing the account, the currency, and also the
16 account number for accounts that were held for these entities
17 during the period 1999 to 2004.

18 THE COURT: Mr. Berger, can you live with that?

19 MR. BERGER: Yeah. Yes. Yes, Your Honor, I can.

20 THE COURT: Okay. Good. Is there anything else
21 that we can work out here today, or is the rest for the meet
22 and confer?

23 MR. RADINE: I think that's it for plaintiffs,
24 pending the meet and confer process.

25 MR. OSEN: And, Your Honor, this is Gary Osen again.

1 Just to be clear, for meet and confer purposes, both the
2 responses to the interrogatories as well as the indexes, the
3 dictionary, and schema, all that is really necessary for the
4 meet and confer process to have any chance of being at all
5 productive.

6 So when that's scheduled, or when that occurs, you
7 know will be obviously somewhat dependent on when the
8 defendant can produce those materials and responses, but once
9 we get them we'll -- you know, we'll be in a position within
10 two weeks to assess when the next conference makes sense.

11 THE COURT: Okay. Mr. Berger, do you have a time
12 frame that you can estimate at this point?

13 MR. BERGER: Well, I guess I'll have to figure out
14 what they think we haven't produced on the scheme and the
15 search terms, but since we think we've already produced it,
16 that shouldn't take long. The indexes, that's just a
17 technical issue we'll have to go to the Sullivan and
18 Strickler, but that should be a matter of, you know, days.

19 The one time consuming bit is reproducing the
20 spreadsheets and the affidavit and I really can't estimate
21 that right now, but that's got to be a minimum of, you know,
22 two weeks, I would think, before we can do that.

23 THE COURT: Okay. All right. So I think we have an
24 approximate time table, today being the 25th.

25 What -- can you give me a status report, a written

1 status report on June 17th? Hopefully, you'll have everything
2 together and you'll be reviewing -- is that a reasonable time
3 to do it?

4 MR. RADINE: I mean (indiscernible).

5 MR. BERGER: A written status report on June 17?

6 THE COURT: Yes.

7 MR. BERGER: For defendant, that's fine.

8 MR. RADINE: (Indiscernible.).

9 THE COURT: Does that work for plaintiff?

10 MR. RADINE: (Indiscernible.) Sure.

11 THE COURT: Is that too tight, or will that work for
12 you?

13 MR. BERGER: For -- we'll do our best. I don't
14 think the 17th should be a problem for a status report. If it
15 is, I'm sure the one thing we'll be able to agree with the
16 other side on is, we'll tell the Court we need more time.

17 THE COURT: Okay. Good. A good feeling starts with
18 that. All right.

19 And then I'll just propose, in the status report, if
20 you can and you're ready to do that, you can propose an
21 approximate, you know, time period within which you think
22 you'd be ready for the next conference.

23 And if you can't do that, you'll just tell me you
24 can't do it, and I'll do it in the next couple weeks after.

25 Okay. Is there anything else to discuss from the

1 plaintiff's end?

2 MR. RADINE: No, Your Honor. I guess in that status
3 report we'll also have whatever update about the subpoenas,
4 since we'd like to reengage JP Morgan.

5 THE COURT: Yes. Okay. And defendants, anything
6 else?

7 MR. BERGER: I think we've covered everything, Your
8 Honor. Thank you.

9 THE COURT: Okay. Thank you. Have a good day,
10 everyone.

11 MR. BERGER: All right. Thank you. Bye bye.

12 MR. RADINE: Thank you, Your Honor.

13 THE COURT: Bye.

14 (Proceedings concluded)

15 I, CHRISTINE FIORE, court-approved transcriber
16 and certified electronic reporter and transcriber, certify
17 that the foregoing is a correct transcript from the official
18 electronic sound recording of the proceedings in the above-
19 entitled matter.

20 
21

22 _____ June 8, 2022

23 Christine Fiore, CERT-410

24 Transcriber
25